



March 22, 2017

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

***Via Electronic Filing***

**Re: *Notice of Ex Parte Communications*, WC Dkt. No. 16-106, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services**

Dear Ms. Dortch:

On March 20, 2017, Eric Null and Sarah J. Morris of New America's Open Technology Institute (OTI) met with Claude Aiken, Legal Advisor to Commissioner Clyburn. During that meeting, OTI made the following presentation regarding the Commission's broadband privacy proceeding.

First, OTI argued that the FCC should reject the petitions for reconsideration of the broadband privacy rule. The FCC has well-established practice of rejecting petitions for reconsideration when those petitions do not present new facts or arguments and when the arguments made in the petitions have already been addressed in the underlying proceeding.<sup>1</sup> That is the case here. Indeed, OTI and other opposition filers "merely cited to the *Report and Order*"<sup>2</sup> because the arguments made by petitioners were already addressed in the *Order*. CTIA also claimed that OTI "failed to address the cases CTIA cited" regarding the reading of Section 222(a) and 222(c), citing to its own comments.<sup>3</sup> Yet, the FCC expounded at length about the proper reading of those two subsections in the *Order*, as did OTI and other organizations in their

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<sup>1</sup> OTI Opposition, at 1.

<sup>2</sup> CTIA Reply to Oppositions, at 3.

<sup>3</sup> *Id.*

comments.<sup>4</sup> The FCC's reading of the statute was reasonable and should not provide the basis for reconsideration.

OTI also reiterated the argument made in its opposition that the FTC has recently expanded the definition of "sensitive" information to include TV viewing history.<sup>5</sup> If TV viewing history is sensitive, then that adds more support for the FCC to include web browsing and app usage history (much of which will include TV viewing history) in its definition of "sensitive." While TV viewing history can be highly personal, web browsing and app usage history give an even more complete picture into consumers' personal and private lives.

As argued in OTI's opposition, the FCC should reject the petitions because it has ample authority to enact the broadband privacy rules and did so based on strong support in the record. Petitioners merely disagree with the FCC's analysis, but policy disagreement alone should not provide a basis for reconsideration.

Second, OTI argued that the threats of full repeal or considerable modification of the rule by Congress and the FCC is creating substantial uncertainty. The full Commission adopted strong privacy rules last year that provided clear guidance, but now consumers do not know whether or how the FCC will ensure the protection of their data going forward, if at all. There is at least one commissioner who believes Section 222 does not apply to broadband in the first instance.<sup>6</sup> Even if the Commission continues to apply Section 222 to broadband providers, consumers do not know how the Enforcement Bureau will enforce the statute nor do they know whether the enforcement advisory from 2015 will be enforced.<sup>7</sup> Without a rule, there is little certainty.

Consumers desire this certainty, otherwise they will continue to limit their online behavior for fear that their data will become compromised or used in ways that otherwise cause

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<sup>4</sup> Order at ¶¶22, 38, 343-367. See, e.g., OTI Reply Comments, at 7-8; Harold Feld *et al.*, *Protecting Privacy, Promoting Competition*, Feb. 2016, at 16-19. NCTA similarly claimed that the FCC's reading was an improper reading of the statute and argued that was "materially erroneous." NCTA Reply to Opp. at 3. But mere disagreement over statutory interpretation does not rise to the level of material error.

<sup>5</sup> OTI Opposition at 11-12.

<sup>6</sup> *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, Dissenting Statement of Commissioner Michael O'Rielly, 31 FCC Rcd 13911, at 14122.

<sup>7</sup> The Enforcement Advisory merely required "reasonable, good faith" efforts to comply with Section 222, a much more relaxed standard than the rule adopted last year. FCC Enforcement Advisory (May 20, 2015) [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-15-603A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-15-603A1_Rcd.pdf).

them harm.<sup>8</sup> Moreover, providers themselves explicitly sought more certainty when they asked for a stay of the *Open Internet Order* in 2015, yet their most recent arguments are inconsistent with that view.<sup>9</sup> The FCC should not leave consumers and providers in the dark.

Therefore, the Commission should reject the petitions for rulemaking.

Respectfully submitted,

/s/ Eric Null

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<sup>8</sup> *Order* at ¶380.

<sup>9</sup> OTI *et al.* Opposition to Motion for Extension of Time, Apr. 25, 2016, at 2-4 <https://ecfsapi.fcc.gov/file/60001690928.pdf>.